No. 7835

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

R. J. Richards,
Petitioner,
vs.
Commissioner of Internal Revenue,
Respondent.

PETITIONER'S OPENING BRIEF.

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STATEMENT OF THE CASE.

QUESTIONS INVOLVED AND HOW RAISED.

This case comes before this Court upon a Petition to Review a decision of the United States Board of Tax Appeals (hereinafter referred to for convenience as "Board") sustaining the Commissioner of Internal Revenue in the determination of Income Tax deficiencies against the petitioner as follows:

Years	Deficiency
1927	$ 486.69
1928	12,552.81

The proceedings before the Board arose under a petition filed by your petitioner on February 14, 1931, for redetermination of the Commissioner's proposed deficiencies of the years given. The opinion of the Board, which is set out in full in the transcript [page 32 *et seq.*], is reported at 30 B. T. A. 1131.

The matter was submitted to the Board for determination on two affidavits of the petitioner [Tr. 51 *et seq.* and Tr. 175 *et seq.*] under a stipulation that the petitioner if called as a witness would testify as set forth in the affidavits. No other evidence was introduced and the matter was considered by the Board upon petitioner's uncontradicted affidavits.

The only issue to be determined is whether or not certain real estate acquired by the petitioner in the vicinity of Los Angeles for use in petitioner's business of producing, packing and selling lettuce and other vegetables and subdivided and sold, more than two years after acquired, and during the taxable years 1927 and 1928, constituted "Capital Assets" within the meaning of sections 208 (a) (8) of the Revenue Act of 1926, and sections 101 (c) (8) of the Revenue Act of 1928.

These sections are substantially similar and section 208 (a) (8) reads as follows, in so far as is applicable to this controversy:

> (8) "The term 'capital assets' means property held by the taxpayer for more than two years (whether or not connected with his trade or business) but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if

on hand at the close of the taxable year, *or property held by the taxpayer primarily for sale in the course of his trade or business.*" (The italics are counsel's.)

The real property involved was acquired by petition as acreage, but was subsequently subdivided and sold by petitioner in a manner more particularly hereinafter set forth, when it became impractical for petitioner to continue to use such acreage in the carrying on of his business. The Commissioner argued and the Board determined in effect that although the petitioner was at all time continuing to operate his business of producing, packing and selling such lettuce and other vegetables, nevertheless by selling as subdivided lots his farm acreage then no longer useful in his business petitioner became engaged in a new business, to-wit, the "real estate business", and the real property was held by him "primarily for sale" in the course of this "real estate business".

Petitioner contended that the sale of such real estate was purely an incident of petitioner's real business of producing, packing and selling lettuce and other vegetables to which petitioner was devoting substantially all of his time, and that the financial success of such business required the liquidation of the particular real property involved, and that by so doing petitioner did not engage in the "real estate business" or any other new business. The respondent further contended that all gains derived by petitioner from the sale of such real estate should be treated as "capital net gain" and taxed at the 12½% rate rather than under the ordinary normal and surtax rate applied to the remainder of petitioner's income. The petition of your petitioner was contested by the Commissioner and

the Board, in an opinion written by Judge Marquette, sustained the Commissioner's objections on the basis of *Willard Pope,* 28 B. T. A. 1255, which is another opinion written by Judge Marquette. This decision was recently reversed by the United States Circuit Court of Appeals for the Sixth Circuit in *Pope v. Commissioner,* 77 Fed. (2d) 599, and is no longer an authority.

STATEMENT OF FACTS.

In the following statement of facts petitioner is including *verbatim* portions of the Board's findings of fact *in italics,* the additions thereto in ordinary type are from the uncontradicted affidavits of your petitioner:

"The petitioner and his wife made joint income tax returns for the years before us, and that the real property involved was acquired by them as joint tenants with the right of survivorship. Since prior to 1920 the petitioner, for himself or as a member of a partnership, has been engaged in the business of raising, packing, buying and marketing farm products, particularly lettuce. About September 15, 1920, petitioner and his wife acquired title to approximately 47 acres of land in Los Angeles County, California. About April 30, 1921, they acquired another tract adjoining the above tract, containing about 4 acres. About March 11, 1922, they acquired title to a third piece of land adjacent to the foregoing tracts. These tracts of land at the time of acquisition lay in a very productive farming area and were used by the petitioner in the raising of lettuce and sometimes chicory and endive. They were surrounded by farm lands producing these same vegetables and because of the ownership by petitioner of

such property petitioner was enabled to make a better approach to other persons raising lettuce in the vicinity and in the shipping of lettuce was able to use his own product as a surplus to be shipped when the crops of other growers in the vicinity were not immediately available for shipment or their price was, in the opinion of petitioner, excessive at such time. [Tr. 176.]

"In 1921 the petitioner erected buildings and other structures on not over three and one-half acres of these lands, which were thereafter used by him as a combined office and residence.

"After the petitioner acquired these properties there was a great deal of real estate activity in the lands between his property and the boundary of the city of Los Angeles. The intervening property began to be subdivided and sold, with the result that the petitioner's property rapidly increased in value until it arrived at a value in excess of $4,000.00 an acre without improvements. Taxes and assessments for local improvements also increased. The taxes on this property in 1920 were $657.84 and for 1924 were $5,903.22 in addition to which the petitioner was required to pay $4,479.95 in 1924 on account of special assessments. This rise in prices" and the upkeep by way of taxes, assessments for local improvements and similar charges made the holding of said lots [Tr. 55] *"and the adjacent lands for gardening purposes unprofitable"* and when produce similar to that being raised by petitioner could no longer be raised in the neighborhood by reason of the subdivision thereof petitioner's property did not furnish a satisfactory base for his shipping operations since there were no other similar crops in the neighborhood to be ac-

quired and shipped by petitioner except his own crop and petitioner could not therefore maintain a constant car lot shipping method which was possible when other produce growers were operating in the vicinity and petitioner was enabled to use his own crops to fill up short car lot loads or supply petitioner's shipping requirements when the market price of other grower's produce was excessive. [Tr. 176.]

In 1925 petitioner determined to subdivide a part of the first parcel of land which he had purchased. In pursuance of this plan on July 15, 1925, he conveyed a portion of the property to the Security Trust & Savings Bank of Los Angeles (now Security First *National Bank of Los Angeles) hereinafter referred to as the bank, which accepted it in trust to secure a note of $28,500 which petitioner and his wife owed the bank, and upon further trust to subdivide and sell the property conveyed. Under the deed of trust petitioner and his wife agreed to pay all taxes and assessments levied on the property, to pay principal and interest on all indebtedness secured by the trust, to pay all claims, liens and encumbrances and defend all suits affecting the property, to pay for all improvements ordered by him or his agent, and to file with the trustee a copy of each contract for improvements to be placed on the property. The property was to be subdivided and improved by the petitioner and his wife.*

The deed of trust *contained provisions which permitted the trustee, upon default of petitioner and his wife in paying the above amounts, to pay them itself, and gave it recourse against the property. The trustee was authorized to rent, sell and convey the property or any part*

thereof to such persons and at such times as it deemed best, provided the sale prices of the land should not be less than those indicated in the schedule to be filed with the deed of trust. *The proceeds received from the sales were to be used to pay commissions and to release liens, the balance to go in what was termed a general fund, out of which the cost and expense of the trust and certain other expenses were to be paid, and what remained over was to be paid to the petitioner and his wife. The deed* of trust *recites that at the request of the petitioner and his wife it appointed P. N. Snyder "as their exclusive agent to subdivide and improve, and to solicit and obtain purchasers for such part of said property" as was subdivided. He was paid a commission, out of which he was to pay for advertising and other selling expenses of himself and his subagents. Among the duties assumed by the agent was the general care and custody of the subdivided property, and of all improvements placed upon the property, which included the installation of gas, water and electricity. The trustee was not required to procure any insurance on any building upon the property, or to collect or disburse any rentals therefrom. These duties were to be performed by the petitioner and his wife.*

Upon payment in full of the indebtedness secured by the deed of trust *and at the request in writing of petitioner and his wife, the trustee was given authority to close and terminate the trust, but was not required to do so as long as any of the covenants contained in any deed remained unperformed. The petitioner and his wife furnished the trustee a list of the minimum prices at which the lots were to be sold. The number of lots was 186.*

The minimum price was $1,250 and the maximum price was $40,000 per lot.

The sales of lots in the first subdivision having proved satisfactory, petitioner determined to subdivide other portions of the property above described. By deed of August 6, 1926, the bank accepted the trust property previously conveyed. The provisions of this trust deed resembled the one of July 15, 1925. Afterward, the petitioner and his wife determined to subdivide and sell the remaining portion of the property purchased as hereinabove set forth, and by deed of trust dated January 12, 1927, the bank accepted such property on practically the same trusts as those provided in the deed of trust *of July 15, 1925.*

The principal reason for the above conveyances was to have all deeds on lots promptly executed, especially in the absence of the petitioner from Los Angeles. The number of lots in the second subdivision above set forth was 82. The number of lots in the third subdivision was 152. In the third subdivision the minimum price for the lots was $1, 200 and the maximum was $15,000. Under each of the deeds, Snyder was appointed by the bank as petitioner's exclusive agent, at their request, for a term of eight months, with the right to serve eight months more upon achieving certain results, and upon the termination of his employment the trustee was to appoint as agent for the petitioner and his wife such person as they directed, all sales, however, to be subject to the approval of the trustee of the bank. That in the sale of lots in the three tracts petitioner took no active part but the promotion, advertising and sale of said lots was handled by the said P. N. Snyder who conducted his advertising campaign in such

a manner as to create the impression he was a subdividor and developer of the property above described to such an extent that the general public believed the said P. N. Snyder was the owner thereof and did not know that your petitioner had any interest in and to the same. [Tr. 63.] *The petitioner's business of producing, packing and selling lettuce and other vegetables increased from year to year, and he substituted, either by lease or purchase, farming properties for the properties which he subdivided.*

Petitioner at no time ever solicited any person to buy any lots in said tracts or advertised any portion thereof for sale by himself or by the bank as trustee or any other person and that on each and every lot sold in said tracts there was paid a commission to the real estate agent selling the same and that any and all contacts and business with said purchasers were handled by said agent and that petitioner at no time had anything more to do with the sale of said tracts, that if said tracts had not belonged to petitioner, except to fix the price at which the same could be sold. The real estate agent selling said lots was at all times engaged in the real estate business and at all times maintained an office for said purpose and was at no time under the control or direction of petitioner but carried on and conducted his business in such manner as he deemed best and without any control, guidance or direction of petitioner. [Tr. 175.]

That at no time has petitioner purchased any real estate for subdivision and sale. That at the time petitioner determined upon the subdividing and sale of said three tracts petitioner did not intent to go into the real estate business or to purchase any additional property for subdivision or sale. [Tr. 62.]

That petitioner has never engaged in the real estate business or in the business of buying and selling real estate, nor has petitioner ever been a dealer in real estate, nor licensed as a broker or salesman under the laws of the state of California, or elsewhere to buy and/or sell real estate, nor is petitioner a member of any real estate board or other organization of persons engaged in the sale of real estate, nor has petitioner any place of business from which he carries on or conducts a real estate business, or the buying and selling of real estate, nor has petitioner ever made purchases or sales or dealt in any way with real estate for third persons. [Tr. 52.]

Board's Conclusions and the Assignments of Error.

The ultimate question of law to be determined upon this appeal is whether the liquidation of real property through sales by your petitioner in the manner set forth in the statement of facts places your petitioner in the "real estate business" although such real property was no longer desirable for use in connection with your petitioner's business of producing, packing and selling vegetables and the liquidation by sale was indirectly occasioned by conditions and circumstances over which your petitioner had not the slightest control. If this court believes under the admitted facts in the case at bar, your petitioner was engaged in the real estate business, then the position of respondent should be sustained. If your Honorable Court, however, believes that the sale of the real property involved was only an incident to the successful management

of petitioner's admitted business of producing, packing and selling vegetables, then the decision of the Board should be reversed.

The assignments of error appear in the transcript of record [Tr. 47 *et seq.*] As they are not extensive they are, for the convenience of the court, here stated as follows:

1. The Board erred in its conclusion that your petitioner was engaged, during the years involved, in any other business than the business of producing and marketing vegetables and other farm products.

2. The Board erred in its conclusion that the real property constituting the tracts above mentioned, required by the petitioner and his wife, in such business of producing and marketing farm products was ever devoted to a purpose not connected with such business.

3. The Board erred in its conclusion that the sale, through said trusts, by your petitioner of said real property was not a partial liquidation of petitioner's said business in so far as said business required the use or ownership of said lots.

4. The Board erred in its conclusion that the issue raised by petitioner was whether petitioner in selling lots in said tracts, during the years 1927 and 1928, through said trusts, was engaged in a business.

5. The Board erred in its conclusion that the lots in said tracts, sold through said trusts, were held by the petitioner primarily for sale in the course of his business.

6. That the Board erred in its conclusion that petitioner is not entitled to the benefits of section 208 of the Revenue Act of 1926, and section 101 of the Revenue Act of 1928, in computing and determining the income taxes of your petitioner during the years 1927 and 1928, with reference to the profits made by your petitioner from the sale of lots in the tracts above mentioned, through such trusts.

7. That the Board erred in redetermining a deficiency in income taxes against your petitioner in the sum of $486.69 for the year 1927, and in the sum of $12,552.81 for the year 1928.

BRIEF OF ARGUMENT.

The rules of law to be discussed herein may be summarized as follows:

1. The sections of the Revenue Act of 1926 and the Revenue Act of 1928, whose interpretation is involved in this decision, are remedial in character.

2. That within the clear intention of these sections your petitioner did not engage in a new business by selling assets of his admitted business when the proper management of such latter business required such sale.

3. That the decision of the Board in *Willard Pope,* 28 B. T. A. 1255, which the Board considers controlling in the case at bar has been overruled in *Pope v. Commissioner,* 77 Fed. (2d) 599.

4. That petitioner's sale of assets was in the nature of a liquidation and not in a sale in the course of business.

I.

The Sections of the Revenue Act of 1926, and the Revenue Act of 1928 Whose Interpretation Is Involved in This Decision Are Remedial in Character.

Prior to the Revenue Act of 1921 there was no provision in the various Acts similar to section 208 (a) (8). Then the net profit made by a taxpayer as the result of a sale of an asset held by the taxpayer for a number of years was considered income for the year in which the sale or other disposal was made. In many instances this prevented the sale by owners of greatly appreciated property and prevented this property from passing into productive hands, and apparently in considering the relief of this situation Congress felt that it would be better to tax such profits at a flat rate of 12½% rather than to receive no taxes at all. The printed report of the Congressional Joint Committee on Internal Revenue taxation then considering this matter states (p. 42) in part, as follows:

> "Taxpayers who realize capital gains fall into two classes—(1) those who *sell property not primarily purchased for purpose of resale*, and (2) those who *sell property purchased for the purpose of resale*. In the former group fall a large number of persons who sell residences, factories, land, and investments often held for a period of many years. In the latter group fall those who *buy* stocks, bonds, and other

property *in the expectation of selling on a rising market.* (Italics are counsel's.)

"From the viewpoint of the first group the capital-gains tax must be regarded as a very needful remedial provision. Their sales are often made under some degree of compulsion, such as the necessity of moving to a new neighborhood, retirement from business, settlement of interests of cotenants, etc. Where property has been held for 10 or 15 years and is then sold, the result may be the immediate conversion into cash of a relatively large profit accumulated over a long period of time. To tax that profit at graduated surtax rates, designed primarily to measure the tax on a single year's profit, is obviously unduly burdensome. If it were practicable to segregate such transactions, consideration might properly be given to their special treatment."

That taxpayer falls in the first class above mentioned is apparent. That he is one of those who should be benefited by such remedial legislation seems clear. The real property involved in this controversy was not purchased for "re-sale," and the disposal of the same was under a "degree of compulsion," *i. e.,* the necessity of removing to other locations for the purposes of conducting petitioner's admitted business in a profitable manner. The tax levied is "unduly burdensome."

II.

That Within the Clear Intention of These Sections Your Petitioner Did Not Engage in a New Business by Selling Assets Under His Admitted Business When the Proper Management of Such Latter Business Required Such Sale.

It is conceded by respondent that petitioner was in the business of producing, packing and selling vegetables, which business for convenience we will hereafter refer to as the "produce business." It is not denied by respondent that a reasonable and proper management of such business required the sale by your petitioner of the real estate involved. Nor is it denied by petitioner that the real property involved was subdivided by your petitioner and held thereafter primarily for sale since it could not be practically used in the conduct of petitioner's produce business. This leaves the question open as to whether or not the real property was for sale "in the course of his trade or business." *It is on this last phrase only* that petitioner and respondent differ. Any asset in any business which is no longer of any use in the business and which the operator of the business desires to dispose of, is of course held "primarily" for sale thereafter. A sale always consists of an offer and an acceptance, the offer may be made by the buyer or by the seller and the acceptance given by the other party. If property is held "primarily for sale" it is held subject to an open offer of the owner to dispose of the same. If the owner is willing to sell but making no special effort to sell his property, possibly the property might not be held "primarily for sale." So far as the income or profits is concerned, it should make no difference whether the owner was openly

offering his property for sale or secretly awaiting an offer from some buyer. The manner of the sale, or the efforts of the owner to dispose of the property would therefore not seem to be the standard for determination in this matter.

Nor does it appear that the term "in the course of his trade or business" would apply to sales of assets by a taxpayer when such sales are not essential to the conduct of the business itself. For example in a produce business it would be necessary in the "course" of such business to buy and sell vegetables; in the "course" of a dry goods business it would be necessary to buy and sell dry goods; in the course of a real estate business it would be necessary to buy and sell real estate. The term "course" means a method of procedure. The method of procedure by which petitioner conducted his "produce business" might require the buying or selling of real estate, but such transactions would not be essential to the produce business or make petitioner in the real estate business. It would be equally absurd to say that a third person was engaged in the "produce business," if his method of conducting a "real estate" business involved the buying and selling of real estate, which had vegetables growing on it.

The Board in its decision points out that a taxpayer may be engaged in more than one business. This, of course, is true, but your petitioner respectfully contends that he does not engage in a second business, to-wit, the "real estate business" when as a proper incident to the produce business he sells an asset no longer useful or desirable in such latter business. That he sells it in a manner which he believes most profitable to him does not

change the situation nor is the situation changed by the magnitude of the operations.

As is stated by the Circuit Court of Appeals in the Second Circuit in *Commissioner v. Morriss Realty Co. Trust No. 2,* 68 Fed. (2d) 648, at 650:

> "Trust No. 2, for the *purpose of liquidation,* owned certain tracts of land which the settlers designed to be sold so as to net the most money for distribution among the beneficiaries according to the respective interests. They were located in the environs of Granite City; their sale for purely agricultural purposes would not have brought a very large return, being located as they were adjacent to an industrial center; it was clear that their greatest value lay in subdividing and selling them as city or town lots. To do so would necesarily take a considerable period of time, and the settlers and trustees had a perfect right to sell the assets of the trust estate, the lands in question, in the most satisfactory way in order to turn the property into cash for the use of the beneficiaries and give them the benefit of the largest measure of distribution."

The court then held that such activities did not show such trust to be carrying "on some business enterprise."

If your petitioner was engaged in more than one business it would seem that there should be a clear delineation between the two and that one should not be a mere incident to the other. In any business there invariably comes a time when capital assets of the business must be replaced or renewed. A factory becomes antiquated and must be sold or rebuilt; machinery becomes obsolescent and must be disposed of as junk or remodeled to bring it up to date. The

disposal of any such an asset is always a problem, and the taxpayer should have the right to dispose of the same in the manner most profitable to himself. It is true that the manufacturer selling obsolescent machinery is selling junk, but he is not engaged in the junk business unless he maintains a stock of trade from which his sales are being replenished.

III.

That the Decision of the Board in Willard Pope, 28 B. T. A. 1255, Which the Board Considers a Controlling Decision in the Case at Bar Has Been Overruled in Pope v. Commisisoner, 77 Fed. (2d) 599.

The opinion of the Board in this matter was written by Judge Marquette, who also wrote the opinion in *Willard Pope, supra.* In writing this opinion Judge Marquette apparently felt bound by his former opinion in *Willard Pope, supra.* He quotes extensively from it and arrives at the same conclusions that he had in the former opinion. Apparently Judge Marquette thought the fact that the transactions involved were not isolated transactions, that money was expended in improvements and that there was "continuity of effort. All done for gain." brought the transactions of your petitioner in subdividing and selling the real estate involved "within the concept of the term 'business.'" That the transactions of your petitioner in subdividing and selling these lots were "business" transactions of course permits of no argument. That they were conducted for a gain is admitted, but all these facts do not show that such sales were *in the course of petitioner's* produce *business* The Board erred in hold-

ing that the real estate transactions of your petitioner constituted a new business, to-wit, the "real estate business," and, therefore, the "capital assets provisions" of the Revenue Acts did not apply. A petition to review the decision of the Board in *Willard Pope, supra,* was taken to the Circuit Court of Appeals for the Sixth Circuit, and the order of the Board of Tax Appeals was unanimously reversed by that court in its decision in *Pope v. Commissioner,* 77 Fed. (2d) 599.

In this last decision it is stated:

> "The sole question presented on this question is whether the evidence is legally sufficient to sustain the Board's findings that the lands were held by petitioner primarily for sale in the course of his trade or business."

It appears, therefore, that the questions in that decision and the instant case were identical. The court in rendering its decision disregarded all of the bases on which the Board had placed its opinion, that is, the fact that the transactions were not isolated, the expenditure of money, the continuity of effort, that the transactions were for gain, and considered only the business activities of the taxpayers, stating:

> "The respondent introduced no testimony before the Board of Tax Appeals. Both of the petitioners testified that they joined other members of the syndicate in putting up the money to buy the land because they thought it was a good investment, and not for the purpose of engaging in the business of buying and selling lands. Neither of them has ever been licensed as a real estate dealer. While both held stock in the Essex Company, neither was ever active

> in the company, and after they purchased the tract for the syndicate in 1920, neither ever bought or sold any real estate * * * By reason of their stock ownership in and official relation to the Essex Company the petitioners could, of course, have engaged in the real estate business, but in our opinion their activities in the company were not such as to justify an inference that they were so engaged. We think the purchase of the land is to be treated as an investment, and the investment having been made, the sale through real estate brokers is to be regarded as a conversion of the capital assets and not a sale by the petitioners in the course of a trade or business.
>
> The order of the Board of Tax Appeals is reversed, and the cause remanded for further proceedings."

In the case at bar the petitioner respectfully submits that the decision of the Circuit Court of Appeals for the Sixth Circuit should be followed to create a uniformity of opinion. Your petitioner certainly did not buy the land involved for re-sale or for the purpose of engaging in the business of buying and selling lands. [Tr. 54.] Petitioner never did engage in the real estate business. [Tr. 176.] All sales were likewise handled through a real estate broker [Tr. 63] and the same conclusion should be arrived at by this court, to wit: That the sales made by your petitioner are "to be regarded as a conversion of capital assets and not a sale by your petitioner in the course of a trade or business."

IV.

That Petitioner's Sale of Assets Was in the Nature of a Liquidation and Not in a Sale in the Course of Business.

It has been unanimously held by the decisions of the various Circuit Courts of Appeals that a liquidation of assets does not constitute doing business. Your petitioner feels that the sale of the real property in question constituted a liquidation of those particular assets. The Board in its opinion disposes of that contention of your petitioner as follows:

> "We may here dispose of the issue raised by the petitioner that in disposing of the lots by sale he was liquidating his business of farming, or at least a part of it. He relies on *Trustees for the Creditors and Stockholders of Gonzolus Creek Oil Co.* (dissolved), 12 B. T. A. 310; *Wilson Syndicate Trust,* 14 B. T. A. 508; *Dauphin Deposit Trust Co., Trustee,* 21 B. T. A. 1214; *G. F. Sloan,* 24 B. T. A. 61; *Blair v. Wilson Syndicate Trust,* 39 Fed. (2d) 43; *White v. Hornblower,* 27 Fed. (2d) 277. We do not perceive the relevancy of these cases. Not only has the petitioner not liquidated his business of farming, but, as we read the record, he has enlarged it. What he has done is to take certain assets individually owned and devoted them to a new purpose."

It is to be noted that in the Board's comments on your petitioner's contention the Board has unanimously accepted the point of your petitioner that he is engaged in the business of "farming" or the produce business, as we have referred to it, but the Board refuses to follow petitioner in the contention that the sale of the real property involved

was an incident of the produce business. Petitioner does not contend that he was liquidating his produce business. That is a going business and requires the use of land for its successful operation. This land your petitioner has on some occasions leased and on others bought, but the land itself when no longer valuable in petitioner's business has been liquidated by petitioner and such liquidation does not create a new "business" and is actually not "doing business" at all. See:

Blair v. Wilson Syndicate Trust (Fifth Circuit), *supra;*

White v. Hornblower (First Circuit), *supra;*

Commissioner v. Atherton, 50 Fed. (2d) 740 (Ninth Circuit);

Commissioner v. Morris Realty Co. Trust No. 2 (Seventh Circuit), *supra.*

Conclusion.

The questions involved in this appeal are solely questions of law; there is no conflict in the evidence and the findings of the Board in the decision from which this petition and review is taken are favorable to the petitioner. It is clear that petitioner was never engaged in the "real estate business" or any other business but the "produce business." It is equally certain that the sale of real estate made by him hereunder was purely incidental to the proper conduct of such "produce business." That such sales also proved profitable to petitioner does not change the situ-

ation, but only speaks favorably for petitioner's general business astuteness. That there were many sales is not important. In order, therefore, that the remedial character of the statute involved may be carried out and that there may be uniformity in the decisions of our Circuit Courts your petitioner requests that your Honorable Court follow the Circuit Court of Appeals for the Sixth Circuit in *Pope v. Commissioner, supra,* and reverse the judgment of the Board of Tax Appeals herein complained of.

C. E. McDowell,
Solicitor for Petitioner.